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Independence of judges and lawyers

Note by the Secretary-General

The Secretary-General has the honour to transmit to the members of the General Assembly the interim report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, submitted in accordance with resolution 8/6 of the Human Rights Council.

Report of the Special Rapporteur on the independence of judges and lawyers

Summary

This is the fourth report of the Special Rapporteur to the General Assembly. It addresses the issues relating to his mandate on which he has focused most closely since his report to the Human Rights Council at its eighth session. It gives an account of activities carried out since then and of activities to be carried out in the near future, including country visits, communications with States and participation at international meetings.

The present report contains a summary of the main conclusions and recommendations of the international seminar on "The protection of human rights under states of emergency, particularly the right to a fair trial", which was held in Geneva in December 2007. In the light of the discussions among the experts, international law and jurisprudence and previous studies of the Special Rapporteur, section IV of the report recalls the important role of judges in protecting human rights during states of emergency and requests States not to interfere with the operation of the justice system, including in times of national emergency.

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Section V reflects the main safeguards against arbitrary detention and due process safeguards, in both ordinary circumstances and states of emergency. The Special Rapporteur stresses the judiciary's central role in guaranteeing these safeguards and warns of the serious consequences that any attempt to deprive judges of this responsibility may have on the exercise of human rights.

The report also refers to judges' remuneration and the serious effect that insufficient or conditional remuneration can have on access to justice and the proper administration of justice. The Special Rapporteur recalls the international instruments that stipulate the importance of offering judges adequate salaries and working conditions.

Finally, the Special Rapporteur outlines the progress made since the adoption of the International Convention for the Protection of All Persons from Enforced Disappearance and presents a summary of the latest developments in the field of international justice. The report concludes with a recapitulation of the main points and provides recommendations for States and the General Assembly.

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I. Introduction

1. The Special Rapporteur on the independence of judges and lawyers, in this fourth report to the General Assembly, gives an account of his most recent activities and the activities that he plans to undertake in the coming months. He highlights the important role of judges in protecting human rights during states of emergency. He also addresses the issue of guarantees of personal freedom and due process from the perspective of the role of judges. He recalls the importance of guaranteeing adequate remuneration for judges and undertakes to give special attention to this issue in the future. Finally, he reviews the most relevant developments in the field of international justice and closes with conclusions and recommendations.

II. Activities of the Special Rapporteur

2. In 2007 the Special Rapporteur spoke at a training course on the inter-American and universal systems for human rights protection, held in Washington, D.C., from 16 to 27 October 2007 by the Inter-American Commission on Human Rights and the Washington College of Law.

3. In November 2007 the Special Rapporteur spoke at the third meeting of the Ibero-American Legal Assistance Network, held in Punta del Este, Uruguay, and in December 2007 he chaired the seminar of experts referred to in the introduction to the present report. In March 2008, he participated in the Ibero-American Judicial Summit held in Brasilia.

4. The Special Rapporteur made an official visit to the Democratic Republic of the Congo from 15 to 21 April 2007 at the invitation of the Government. The mission report was submitted to the Human Rights Council at its eighth session. From 19 to 29 May 2008, he made an official visit to the Russian Federation. The mission report will be submitted to the Human Rights Council in 2009. The Special Rapporteur thanks both Governments for having made these visits possible.

5. Finally, in June 2008, the Special Rapporteur participated in the fifteenth annual meeting of special procedures mandate holders of the Human Rights Council and the eighth session of the Human Rights Council, held in Geneva, at which he introduced his report on the Democratic Republic of the Congo and his annual report, whose main theme was access to justice.

6. The Special Rapporteur plans to visit Angola, Cambodia, the Philippines, Guatemala, Kenya, Nigeria, the Islamic Republic of Iran, Georgia and Azerbaijan. He looks forward to affirmative replies about visits that have not yet been approved. He thanks the Governments that have already given their consent and is ready to discuss with them possible dates for the visits. He sent a letter to the Government of Fiji proposing dates for a visit, in light of the statement made in May 2008 by the Attorney-General in support of such a visit. He hopes to reach an agreement in the near future on the dates of this visit.

7. Finally, the Special Rapporteur would like to mention the recent progress in the Maldives. A new Constitution was adopted by the Constituent Assembly in June 2008 and ratified by the President on 7 August 2008. The Constitution incorporated several recommendations made by the Special Rapporteur following his visit to the country in 2007, including the establishment of a Supreme Court as the highest

court in the country, the establishment of an independent Judicial Service Commission and the creation of the post of Attorney-General.

III. The protection of human rights under states of emergency, particularly the right to a fair trial

8. On 3 and 4 December 2007, a seminar of experts on "The protection of human rights under states of emergency, particularly the right to a fair trial" was held in Geneva. It was organized by the Office of the United Nations High Commissioner for Human Rights at the initiative of the Special Rapporteur on the independence of judges and lawyers, who chaired the seminar, and in cooperation with the International Commission of Jurists. The Special Rapporteur would like to bring to the attention of the General Assembly the following points which, in his opinion, are particularly important.

9. Declared and undeclared states of emergency continue to give rise to serious human rights violations. The most common and worrying violations include arbitrary detention, torture and ill-treatment, enforced disappearance, denial of the right to challenge in court the legality of a detention, denial of the right to be tried by an independent court, unfair trials, attacks on freedom of expression and association, and forced labour.

10. The experts took note of the rising number of States that declare states of emergency and of States that, without declaring a state of emergency, have adopted or strengthened national security measures or counter-terrorism laws and regulations that allow for limitations of human rights that are comparable to, or even more drastic than, those that might be adopted during states of emergency. They observed that an increasing number of States derogate from rights in disregard of the conditions imposed by international law, especially those contained in article 4 of the International Covenant on Civil and Political Rights (hereinafter "the Covenant"). In some cases, even non-derogable rights are suspended.

11. Seminar participants also expressed concern about the impact that states of emergency tend to have on the judiciary's independence. In these circumstances, extraordinary powers are granted to military or special tribunals to try civilians, without the necessary safeguards to prevent violations of the right to a fair trial. The experts recalled that the suspension of rights during states of emergency must meet the requirements laid down in international law and regulations, which include judicial review of the legality of both the declaration and the measures adopted.

12. The experts stressed that the judiciary's role in protecting human rights cannot be restricted during states of emergency. They condemned the tendency to remove judges from office and grant extensive jurisdictional powers to military tribunals, including the authority to try civilians.

13. Notwithstanding the above-mentioned points, the last decade has seen important legislative and judicial developments relating to the protection of human rights during states of emergency. According to the experts, one of the most important was the expansion of the list of non-derogable rights. Another significant development was the adoption of the International Convention for the Protection of All Persons from Enforced Disappearance, which not only does not contain any provision that allows for derogations from the rights it protects, but also sets out a

number of non-derogable rights, including the right to know the truth about the circumstances of an enforced disappearance and the right of a detainee to challenge the legality of a detention and receive family visits and legal assistance.

14. The following conclusions were reached at the seminar: (a) human rights law is applicable in all circumstances, including both declared and undeclared states of emergency. Human rights law therefore remains in force, together with other branches of international law, such as international humanitarian law and international labour law; (b) every state of emergency must remain within the framework of the norms and principles underpinning the rule of law. Its aim must be democratic and its adoption, implementation modalities and maintenance must be subject to controls; (c) states of emergency should never impinge on the judiciary's integrity and independence, since otherwise the rule of law would be affected; (d) all individuals must be treated within the framework of the law as subjects of law.

15. In view of such important legislative and jurisprudential developments, the experts considered it timely to suggest carrying out a study to systematize the body of rules, practice and jurisprudence relating to the protection of human rights during states of emergency at the universal, regional and national levels. This study could serve as the basis for drafting a universal declaration that incorporates the principles governing the protection of human rights during states of emergency with a view to consolidating relevant international standards. Finally, the experts suggested that the Human Rights Council should: (a) pay special attention to the exercise of human rights during states of emergency, including within the framework of the universal periodic review, under which this issue of concern should be monitored systematically; (b) establish a procedure whereby, when a State declares a state of emergency or adopts or strengthens legislation that restricts the enjoyment of human rights (representing a de facto state of emergency), it can be quickly ascertained whether that State has duly respected the main human rights norms and principles; (c) invite all the special procedures to take into account the impact of states of emergency on the rights that are relevant to their respective mandates.

IV. The role of judges in relation to states of emergency

16. The Special Rapporteur has found that there is a risk of human rights violations when a state of emergency is declared. This risk arises not only from the circumstances that led to the declaration of the state of emergency, but also from the measures that Governments adopt under the state of emergency. In accordance with article 4 of the Covenant and similar provisions of regional human rights treaties, in time of public emergency which threatens the life of the nation and the existence of which has been officially proclaimed, States may suspend certain guarantees and rights. However, such measures must respect the principles of legality, official proclamation, international notification, temporality, exceptional threat, strict necessity, proportionality, non-discrimination, and compatibility with other international obligations, including the provisions of international humanitarian law.[1] The judiciary plays an essential role in ensuring compliance with each of these principles, which represent minimum guarantees of respect for the rule of law in

[1] Report of the Special Rapporteur (A/HRC/4/25), paras. 37-53, and E/CN.4/Sub.2/1997/19 and Add. 1.

extreme situations. Nonetheless, there is a tendency to call into question judicial oversight of states of emergency by arguing that the judicial branch is incapable of assessing the extent of the emergency. Following this line of thinking, only the executive branch, or in some cases the legislative, is competent to order and implement exceptional measures. In the light of the tendency to abuse the state of emergency and the related restriction of rights, the Special Rapporteur considers that the courts cannot be denied the authority to question a Government's motives in declaring a state of emergency and suspending rights, or the authority to limit the measures imposed during states of emergency if such measures violate national and international legality.

17. The judiciary represents an essential control mechanism for ensuring that both the declaration and the provisions of a state of emergency comply with human rights law and the obligations of States in that regard. It plays a very important role in ensuring that the executive branch does not abuse its wide-ranging powers during states of emergency, especially in situations in which the regulations governing states of emergency contain ambiguities and unclear elements of certain criminal offences, such as those relating to national security.

18. The judiciary must also play a part in ensuring that the formal requirements of a state of emergency are fulfilled. In this regard, the Special Rapporteur welcomes legislation that stipulates that a state of emergency proclaimed by a Government or parliament must be subsequently ratified by the highest judicial body. Judicial oversight of the duration of a state of emergency in relation to the circumstances that prompted its adoption and that justify its renewal and maintenance is also essential. Judges must be able to nullify extensions of states of emergency if they do not meet legal requirements or if the circumstances that justified the adoption of the state of emergency have changed.

19. The judiciary also plays an essential role in assessing the proportionality of the measures adopted in relation to the seriousness of the situation. When the principle of proportionality is not strictly respected, the competent legal bodies must have the authority to nullify exceptional measures that are not proportionate to the situation or within the limits established by both national legislation and international human rights law. Judges must be able to declare illegal any exceptional measure that is based exclusively on discriminatory grounds. Furthermore, they represent the best guarantee for preventing the suspension of the non-derogable rights listed in article 4, paragraph 2, of the Covenant, and of all other rights that are also non-derogable under international law.

V. Safeguards against arbitrary detention and due process safeguards: the role of judges

20. The Special Rapporteur has received a large number of cases that show that there is a risk of human rights abuses when the role of judges is reduced, especially in relation to the rights set out in articles 9 and 14 of the Covenant, which relate to personal freedom and due process. The lack of judicial control over the restriction of these rights allows for the possibility of serious violations of non-derogable rights, including torture and ill-treatment, enforced disappearance, inhuman conditions of detention, or even extrajudicial executions. As shown in the preceding paragraphs,

these situations do not only exist during states of emergency.[2] In many cases, regardless of whether or not a state of emergency has been declared, parallel systems for the administration of justice are established on the basis of specific legislation relating to national security, the fight against terrorism or immigration control.[3]

21. International regulations and jurisprudence provide clear guidelines on the role of judges in protecting human rights and in ensuring due process safeguards and safeguards against arbitrary interference with personal freedom. The following pages contain a review of the guarantees contained in articles 9 and 14 of the Covenant and the relevant jurisprudence of regional and universal human rights bodies.

A. Safeguards against arbitrary detention

22. While circumstances do exist in which States have the power to restrict the right to liberty, human rights law establishes criteria and measures of protection to ensure that detention is neither unlawful nor arbitrary. The Special Rapporteur nonetheless observes with concern that despite the existence of extensive international standards and a rich jurisprudence on this subject, there are still many cases in which judges are removed from their role of reviewing the legality and appropriateness of detentions.

23. Under article 9, paragraph 1, of the Covenant, no one may be deprived of liberty except on such grounds and in accordance with such procedures as are established by law. These procedures must comply both with national legislation and with international laws and principles. As the Human Rights Committee has made clear, detention must not only be lawful but must also constitute a reasonable, necessary and appropriate measure in the circumstances.[4] Accordingly, in keeping with the principle of non-discrimination that is of the very essence of the Covenant, detention may not be based solely on race, colour, sex, language, religion, political opinion, or other status.

24. Anyone who is detained has a right to be informed immediately of the reason for his detention and of his rights,[5] in particular the right to the assistance of legal counsel.[6] He must also be informed promptly of the charges against him, in a language he understands.[7] Foreigners must in addition be informed of their right to communicate with their embassies or consulates or, in the case of a refugee, a stateless person or a person under the protection of an intergovernmental

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[2] The Special Rapporteur would like to refer to his report to the Human Rights Council at its fourth session, in which he noted the impact of states of emergency and other exceptional measures on human rights and the judiciary (A/HRC/4/25, para. 51). He would also like to refer to the report that he prepared in 1997 as Special Rapporteur on the question of human rights and states of emergency (E/CN.4/Sub.2/1997/19 and Add.1), as well as the discussions that took place at the seminar on "The protection of human rights under states of emergency, particularly the right to a fair trial", which are reflected in the present report.

[3] See A/HRC/4/25, para. 52.

[4] Human Rights Committee, decision of 21 June 1994, communication No. 458/1991 (Cameroon).

[5] Article 9, para. 2, of the Covenant and principle 10 of the Body of Principles.

[6] Principle 17 of the Body of Principles and principle 5 of the Basic Principles on the Role of Lawyers.

[7] Principle 14 of the Body of Principles.

organization, the right to contact the competent international organization.[8] Any detainee also has the right to communicate with the outside world. This includes the right to communicate and receive visits, to inform family members of the arrest or detention and the place of detention and to have access to family members, a lawyer[9] and a doctor.[10] Detained foreigners are also entitled to communicate by appropriate means with representatives of their Governments or, if under the protection of an intergovernmental organization, to communicate with that organization.[11] In the context of efforts to combat terrorism, the right of detainees to have contact with the outside world, and particularly to have access to their family members and a lawyer and doctor of their choosing, has been severely restricted. National counter-terrorism legislation usually allows incommunicado detention for several days.

25. It is a fundamental guarantee that authorization for incommunicado detention must be made by a judge in order to prevent enforced disappearance and other serious human rights violations. The appearance before a judge of a person being held incommunicado may be his only point of contact with the outside world in days. Given the numerous incidents on record of abuse against persons held incommunicado, judges must play a role in the process to act as an intangible safeguard. Their role should not be limited to merely reviewing the documents on the detainee's case. On the contrary, they should meet with the individual in question and allow him to state the grounds on which he considers his detention and his treatment during detention unlawful. With respect to incommunicado detention, the Special Rapporteur on the question of torture has repeatedly called for this practice to be declared illegal.[12] The Human Rights Committee has also urged all States to enact provisions against incommunicado detention.[13]

26. International law also establishes that all persons detained under suspicion of a criminal offence have a right to legal assistance before trial.[14] If they are unable to afford a legal counsel of their own choosing, they must have a right to competent and effective legal aid free of charge. Furthermore, detainees are entitled to have adequate time and facilities to communicate confidentially with their lawyers.[15] In

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[8] Article 36 of the Vienna Convention on Consular Relations; article 16, para. 7 (c), of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; and principle 16, para. 2, of the Body of Principles.

[9] Principles 5 and 7 of the Basic Principles on the Role of Lawyers.

[10] Principle 19 of the Body of Principles and article 17, para. 2 (d), of the International Convention for the Protection of All Persons from Enforced Disappearance. As the Human Rights Committee made clear in its general comment No. 20, the right to communicate with the outside world is an important guarantee for the prevention of torture.

[11] Article 36 of the Vienna Convention on Consular Relations; article 17, para. 2 (d), of the International Convention for the Protection of All Persons from Enforced Disappearance; article 16, para. 7 (b), of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; principle 16, para. 2, of the Body of Principles; rule 38 of the Standard Minimum Rules for the Treatment of Prisoners; article 2 of the Code of Conduct for Law Enforcement Officials; and article 10 of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live.

[12] Report of the Special Rapporteur on the question of torture (E/CN.4/2004/56), para. 37.

[13] Human Rights Committee, general comment No. 20.

[14] Principle 1 of the Basic Principles on the Role of Lawyers; principle 17, para. 1, of the Body of Principles. See also rule 93 of the European Standard Minimum Rules for the Treatment of Prisoners and article 55, para. 2 (c), of the Rome Statute of the International Criminal Court.

[15] Principle 8 of the Basic Principles on the Role of Lawyers.

many countries, persons who have been detained under suspicion of terrorism do not have the right to consult a lawyer of their choice, especially when in police detention, and their assigned counsel do not fully perform their role of providing competent and effective legal assistance.

27. Article 9, paragraph 3, of the Covenant sets out the obligation to bring any person arrested or detained on a criminal charge promptly before a judge or other officer authorized by law to exercise judicial power. International standards do not stipulate the maximum time that may elapse between a person's detention and his appearance before a judge, suggesting that the maximum time limits should be determined on a case-by-case basis. In examining recent communications, the Human Rights Committee has indicated that an unjustified delay of three days before the detainee is brought before a judicial officer is a violation of article 9, paragraph 3.[16]

28. Although this subparagraph seems to exclude from the scope of its protection individuals who are detained outside the criminal system and those under administrative detention or in military custody, it should be noted that the other guarantees contained in article 9 have a broader scope of application. In that connection, no deprivation of liberty can be completely exempt from judicial control. All persons who are detained, whether on criminal or other grounds, have a fundamental right, in particular, to come before a court so that it may decide on the lawfulness of the detention (article 9, para. 4) and the right to an effective remedy when an individual claims to be deprived of his liberty in violation of the Covenant (article 2, para. 3).[17]

29. The right to challenge the legality of one's detention is different from the right to appear before a judge in that it applies to all persons who are deprived of their liberty (whether in criminal cases or in other cases) and is exercised by or on behalf of the detainee, and not by the authorities. It is important to remember this guarantee given the large number of persons who are detained under administrative orders as part of immigration control and the processing of asylum applications, whose detention is often ordered and renewed without proper judicial oversight.

30. The right to challenge the legality of detention or to file a petition of habeas corpus or an application for *amparo* is now a standard of customary international law. A substantial body of jurisprudence has been developed indicating that this right is meaningless in situations where a judge is replaced by an authority that is not sufficiently independent and impartial to consider the legality of detention and to determine whether the detainee's human rights are being respected. Judges must have the power to review and make decisions on the procedural and substantive grounds of detention and to order the detainee's release. Until a competent court has entered a final judgement, the legality and appropriateness of detention must be periodically reviewed in order to assess whether the original grounds for the detention remain valid.

31. The competence, independence and impartiality of the judiciary is a necessary condition for safeguarding all of these guarantees, in particular the right of habeas

[16] Human Rights Committee, decision of 14 October 2002, communication No. 852/1999 (Hungary). See also the Committee's concluding observations on Ukraine (CCPR/C/UKR/CO/6).

[17] Human Rights Committee, general comment No. 8, para. 1.

corpus. In response to the argument that the executive branch has jurisdiction to consider habeas corpus applications, the Special Rapporteur emphasizes that applications made to a Government never meet all of the conditions required by law to challenge detention before a judge. In that respect, the Human Rights Committee has held on several occasions that the possibility of having the Ministry of the Interior review the detention of an asylum-seeker does not satisfy the requirements of article 9, paragraph 4.[18] Furthermore, the Human Rights Committee has indicated that giving a prosecutor rather than a judge the authority to determine the lawfulness of preventive detention and decide upon its continuance is incompatible with article 9, paragraph 3, of the Covenant.[19] In another case in which pre-trial detention was renewed several times by a prosecutor, the Human Rights Committee stated that it was not satisfied that the public prosecutor could be regarded as having the institutional objectivity and impartiality necessary to be considered an officer authorized to exercise judicial power within the meaning of article 9, paragraph 3, of the Covenant.[20]

32. Beyond the guarantees strictly associated with article 9 of the Covenant, the oversight role of the judiciary is essential to prevent violations of the human rights laid down in articles 7 and 10 of the Covenant with respect to persons deprived of liberty.[21] The main responsibility for the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment lies with the officials holding detained persons in custody. However, judges must exercise an important role in monitoring the treatment of persons deprived of liberty. The competent judicial authorities should therefore have at their disposal the official register of all detainees. The register should also be available to the relatives of the detained person, his or her lawyers and any person who has a legitimate interest in this information.[22] In accordance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, when a person makes an allegation to the judicial authorities that he or she has been subjected to torture or ill-treatment in the custody of the security forces, an effective, thorough and impartial investigation must be opened immediately and those responsible must be brought to justice without delay.[23]

33. During emergency situations, one of the special powers that the executive authorities have increasingly conferred upon themselves has been to deprive persons of liberty while limiting or excluding judicial oversight as to the legality of these measures.[24] The Special Rapporteur would like to recall that, while article 9 is not listed among the non-derogable rights in article 4, paragraph 2, of the Covenant, the guarantees contained in paragraphs 3 and 4 of article 9, as well as other safeguards related to detention, apply under any circumstances. These guarantees include the

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[18] Ibid., decision of 2 April 1990, communication No. 291/1988 (Finland).

[19] Ibid., concluding observations, Belarus (CCPR/C/79/Add.86), para. 10.

[20] Ibid., decision of 22 March 1996, communication No. 521/1992 (Hungary), para. 11.3.

[21] For further details on the role of judges in relation to the prevention of torture, see European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, twelfth general report (CPT/Inf (2002) 15), para. 45.

[22] Human Rights Committee, general comment No. 20, para. 11.

[23] See also the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Principles), recommended by the General Assembly in its resolution 55/89 of 4 December 2000.

[24] Report of the Special Rapporteur (A/HRC/4/25), paras. 51-53.

right to be informed of the reasons for arrest,[25] safeguards against abuses during questioning,[26] the maintenance of normal standards of proof[27] and the right to challenge the legality of detention before a judge.

34. The Human Rights Committee has expressly stated its belief that "States parties generally understand that the right to habeas corpus and *amparo* should not be limited in situations of emergency. Furthermore, the Committee is of the view that the remedies provided in article 9, paragraphs 3 and 4, read in conjunction with article 2, are inherent to the Covenant as a whole".[28] At the regional level, the Inter-American Court of Human Rights has determined that States may not derogate from the right to habeas corpus, even in exceptional circumstances.[29]

B. Due process safeguards

35. Article 14 of the Covenant guarantees that everyone is entitled to a hearing by a competent, independent and impartial tribunal to determine their civil rights and obligations and that everyone suspected of having committed an offence shall receive a fair trial. The guarantees codified in article 14 and the corresponding provisions of international law are both fundamental and complex. In his latest report to the Human Rights Council, the Special Rapporteur referred to those aspects of article 14 related to procedural guarantees and other institutional questions related to access to justice, such as the separation of powers and the independence of the courts.[30] On this occasion, the other requirements arising from article 14 will be examined. These oblige States to provide a series of measures to ensure observance of people's right to fair and public hearings, to be presumed innocent, not to be compelled to testify against themselves or to confess guilt, to be tried without undue delay, to defend themselves in person or through legal assistance, to be present during their trials and appeals, to obtain the attendance and examination of witnesses against them and on their behalf, to interpretation and translation, to a reasoned public judgement, and to an appeal. States must also

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[25] The courts of the United Kingdom of Great Britain and Northern Ireland declared illegal the practice, during the period that emergency laws were in effect in Northern Ireland, of not informing persons who had been arrested about the grounds for their detention. The European Court of Human Rights also referred to this practice in the case of *Ireland* v. *United Kingdom*.

[26] No statements or confessions or other evidence obtained in violation of article 7 of the Covenant may be invoked as evidence in any proceedings covered by article 14, including during a state of emergency (Human Rights Committee, general comment No. 32).

[27] Human Rights Committee, general comment No. 32, para. 33.

[28] Human Rights Committee, general comment No. 29, footnote 9.

[29] Inter-American Court of Human Rights, 1987 annual report (OEA/Ser.L/V/III.71, document 13), Advisory Opinion OC-8/87 of 30 January 1987 on habeas corpus under suspension of guarantees. In the opinion of the Court, guarantees relating to due process also cannot be suspended. See Inter-American Court of Human Rights, 1988 annual report (OEA/Ser.L.V/II.74, document No. 10, rev.1), Advisory Opinion OC-9/87 of 6 October 1987 on judicial guarantees in states of emergency.

[30] Report of the Special Rapporteur (A/HRC/8/4). The Human Rights Committee also studied this matter in detail and its latest general comment provides a practical explanation to improve the implementation of article 14. The Special Rapporteur also takes note of the final report submitted by Mr. Stanislav Chernichenko and Mr. William Treat to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, entitled "The administration of justice and the human rights of detainees: the right to a fair trial: current recognition and measures necessary for its strengthening" (E/CN.4/Sub.2/1994/24).

guarantee that the use of evidence obtained by torture and other forms of coercion, the retroactive application of criminal laws and the prosecution of an accused more than once for the same offence (*non bis in idem*) are prohibited.

36. It is evident from the Special Rapporteur's wide experience that limiting judges' scope of action, restricting their area of jurisdiction or undermining their independence jeopardizes most judicial guarantees, particularly the exclusion of evidence obtained by torture or other forms of coercion, the right to be tried without undue delay, the right to report violations of the rights of the accused to a competent judicial authority at all stages of the proceedings, the right to appeal judgements, and the fundamental right to be presumed innocent.

37. Another key aspect of this question is the role of the judiciary in countries where criminal investigations are not the responsibility of the judicial police but are under the direct jurisdiction of the executive branch, owing not only to the risk of impunity when investigations are aimed at establishing the responsibility of executive officials, but also to the need to safeguard individual rights and public freedoms in response to certain probative measures that may interfere with the exercise of such rights and freedoms — as in the case of telephone recordings, body and house searches or the monitoring of correspondence — with respect to the right to privacy (article 17 of the Covenant). The Special Rapporteur would like to recall the role that judges should play in these cases in order to ensure that such measures are legal, pursue a legitimate aim and are conducive to the achievement of that aim.

38. As established by the Human Rights Committee in its latest general comment[31] and as expressly stated by the Special Rapporteur in previous reports,[32] the principle of equality is a crucial aspect of access to justice. According to both, article 14 should be read in conjunction with article 2, paragraph 1, article 3 and article 26 of the Covenant, which prohibit discriminatory laws and protect the right to equality before the courts, in terms of both proceedings and the way in which the law is applied to individuals.

39. The guarantees for a fair trial contained in article 14 of the Covenant are not listed among the explicitly non-derogable rights mentioned in article 4. However, the development and implementation of international law point to the inclusion of a considerable part of the right to a fair trial in the list of rights that may not be suspended under any circumstances. This was recalled and discussed by the Special Rapporteur, on the basis of international legal provisions and case law, in his report submitted to the Human Rights Council at its fourth session.[33] The latest general comment of the Human Rights Committee has since reaffirmed this principle: "States derogating from normal procedures required under article 14 in circumstances of a public emergency should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation. The guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights".[34]

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[31] Human Rights Committee, general comment No. 32, paras. 7-14.

[32] Report of the Special Rapporteur (A/HRC/8/4), paras. 15-54.

[33] Report of the Special Rapporteur (A/HRC/4/25), para. 49.

[34] Human Rights Committee, general comment No. 32, para. 6.

C. Grounds for concern

40. In the course of his mandate, the Special Rapporteur has had the opportunity to examine situations in which restrictions imposed on the operation of the justice system have led to arbitrary detentions and unfair trials. These are situations which involve, for example, the transfer of jurisdiction to military tribunals or the practice of trials with "faceless" judges.[35] Detentions and trials related to terrorism raise special concerns about judicial procedure. In this connection, the Special Rapporteur refers to the reports in which this matter has already been examined[36] and to the work of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.

41. On this occasion the Special Rapporteur expresses serious concern about prolonged pre-trial detentions, detentions on health grounds or for the maintenance of public order, extraditions without judicial supervision, and trials based on traditional or religious justice conducted by tribunals that do not fully observe international human rights principles and may undermine the operation of the justice system.

42. The legal status of immigrants and asylum-seekers is a crucial issue today that affects millions of people, who face grave restrictions of their right to liberty in the context of immigration procedures and are frequently detained by administrative orders issued without judicial supervision. The Human Rights Committee has addressed this matter on many occasions, declaring that it is a violation of article 9 of the Covenant to prolong the deprivation of liberty of an immigrant without any justification and without the possibility of judicial review.[37]

43. The Special Rapporteur wishes to refer to the letter that he and nine other United Nations special procedures mandate holders sent to the States members of the European Union on 16 July 2008 in order to express their concern regarding the provisions of the European Union Return Directive adopted by the European Parliament on 18 June 2008. In the letter, the experts strongly questioned the provisions of the Directive and expressed their grave concern regarding, inter alia, the detention regime that is applied during the repatriation process, including in the case of unaccompanied minors and other vulnerable groups. The Directive establishes detention periods of between 6 and 18 months. It is a matter of serious concern that unaccompanied minors who are already in serious and delicate circumstances can be treated like criminals. To criminalize illegal immigration and use detention as a kind of punishment is, of course, a disproportionate response. The experts therefore recommended that alternatives to detention should be envisaged and that legislation should spell out more clearly States' obligations in this regard. They also stressed the importance of respecting the needs of vulnerable groups and, therefore, of protecting and establishing specific safeguards for victims of severe psychological or physical abuse and victims of sexual violence, including rape. Such persons must be treated with great care during the consideration of their cases.

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[35] With respect to military tribunals, see the report of the Special Rapporteur (A/61/384), paras. 18-47. Regarding trials with "faceless" judges, see A/HRC/4/25, para. 31. The Human Rights Committee has already addressed both matters in its general comment No. 32.

[36] Reports of the Special Rapporteur (A/60/321 and E/CN.4/2005/60). In this respect, see also general comment No. 32 of the Human Rights Committee.

[37] See, for example, the decision of 28 October 2002, communication No. 900/1999 (Australia), and the decision of 6 August 2003, communication No. 1014/2001 (Australia).

Lastly, the Directive does not provide sufficient legal or procedural safeguards with respect to either conditions of detention or judicial review, which, in any case, must be set in motion by the immigrant facing repatriation. Judicial review is not a privilege but a human right that States must guarantee, even in times of public emergency. Accordingly, the provision whereby a repatriation decision may include a ban on returning to the European Union for a period of up to five years could constitute a violation of the universal principle of non-refoulement.

44. The Special Rapporteur considers it relevant here to recall article 16, paragraph 8, of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, general comment No. 15 of the Human Rights Committee on the position of aliens under the Covenant (para. 7) and deliberation No. 5 of the Working Group on Arbitrary Detention on the situation regarding immigrants and asylum-seekers (principle 8), which reads as follows: "Notification of the custodial measure must be given in writing, in a language understood by the asylum-seeker or immigrant, stating the grounds for the measure; it shall set out the conditions under which the asylum-seeker or immigrant must be able to apply for a remedy to a judicial authority, which shall decide promptly on the lawfulness of the measure and, where appropriate, order the release of the person concerned".[38] The Working Group has stated on other occasions that "even where illegal immigrants and asylum-seekers are concerned, any decision to place them in detention must be reviewed by a court or a competent, independent and impartial body in order to ensure that it is necessary and in conformity with the norms of international law and that, where people have been detained, expelled or returned without being provided with legal guarantees, their continued detention and subsequent expulsion are to be considered as arbitrary".[39] In all cases, the judicial authority must ensure that the person being extradited will not be subject to human rights violations in the country of destination and that the right of non-refoulement is scrupulously respected.

VI. Remuneration of judges

45. The deterioration in judges' working conditions is frequently brought to the Special Rapporteur's attention as a dangerous influence on the action taken by the judiciary;[40] this problem affects some regions more than others. The Special Rapporteur recalls that, in the same way that the judicial branch requires adequate resources in order to perform its functions in an efficient, competent and impartial manner, judges must receive decent salaries so as to be able to live off their judicial functions alone. It is a proven fact that when judges' salaries go down or are kept low, the proper administration of justice and, therefore, the reliability and reputation of the justice system suffer.

[38] Report of the Working Group on Arbitrary Detention (E/CN.4/2000/4), annex II.

[39] Report of the Working Group on Arbitrary Detention (E/CN.4/2004/3), para. 86.

[40] See, for example, the Special Rapporteur's preliminary note (A/HRC/4/25/Add.3, para. 4) and final report (A/HRC/8/4/Add.2, paras. 35 and 36) on his mission to the Democratic Republic of the Congo. The Human Rights Committee has also expressed concern regarding judges' low pay (see the Committee's concluding observations on the Democratic Republic of the Congo (CCPR/C/COD/CO/3), para. 21) and regarding delays in the payment of judges' salaries (see the Committee's concluding observations on Georgia (CCPR/CO/74/GEO), para. 12).

46. First, if the function of judges is not recognized properly in terms of working conditions and pay, the number of people entering the profession will decline, resulting, in the long term, in a shortage of people with the training and skills needed to do the job. Judge shortages seriously hinder access to justice. Second, a judge who does not receive sufficient remuneration may be forced to carry out other economic activities in parallel to his or her judicial functions, even though these activities may be incompatible with, or even detrimental to, the performance of his or her functions as a judge. Lastly, the Special Rapporteur wishes to point out that judges who are not adequately compensated may be more tempted to engage in corrupt practices, with all the disastrous consequences that this implies for the independence and impartiality of the judge in question and for the proper administration of justice and the reliability and reputation of the judiciary in general.

47. Even when the principle whereby judges' salaries may not be reduced has been enshrined in national legislation, this principle is often violated through a variety of Government measures. For this reason, the Special Rapporteur wishes to recall those international instruments that emphasize the need for fair salaries for judges: the Basic Principles on the Independence of the Judiciary (principle 11), the Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary (procedure 5), the Universal Charter of the Judge (article 13), the European Charter on the statute for judges (principle 6), the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (principle A.4 (m)), the Draft Universal Declaration on the Independence of Justice, also known as the Singhvi Declaration (articles 16 (a) and 18 (a) and (b)), the Charter of the Ibero-American Judge (article 32), the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA (Law Association for Asia and the Pacific) Region (principle 31), the Burgh House Principles on the Independence of the International Judiciary (principle 4) and recommendation No. R (94) 12 of the Committee of Ministers to Council of Europe member States on the independence, efficiency and role of judges (principles I (2) (a) (ii) and III (1) (b)).

VII. Key developments in international justice

A. International Convention for the Protection of All Persons from Enforced Disappearance

48. On 20 December 2006, the General Assembly adopted the International Convention for the Protection of All Persons from Enforced Disappearance, the importance of which the Special Rapporteur had underscored in paragraphs 7 to 17 of a previous report (A/61/384). While welcoming the fact that this valuable international legal instrument already has 73 signatory States and 4 States parties, the Special Rapporteur calls on all States to ratify the Convention as soon as possible so that the 20 instruments of ratification required for its entry into force may be obtained. Furthermore, he calls on all States to recognize the competence of the Committee on Enforced Disappearances to receive and consider communications from individuals or States parties, in accordance with articles 31 and 32 of the Convention.

B. Update on cases before the International Criminal Court

49. The Special Rapporteur welcomes the following developments in the investigations currently under way:

1. Democratic Republic of the Congo

50. The decision by the International Criminal Court in April 2008 to unseal the arrest warrant for Mr. Bosco Ntaganda, former deputy Commander-in-Chief of the Forces patriotiques pour la libération du Congo (FPLC), is a major step forward. For this reason, the Special Rapporteur calls on the authorities of the Democratic Republic of the Congo, other countries affected by this individual's crimes and the international community to cooperate with the Court.

51. The Special Rapporteur has learned that the Court has postponed the trial of Mr. Thomas Lubanga, President of the Union des patriotes congolais, in order to safeguard the defendant's right to a fair trial, in particular his right to prepare his defence. The Special Rapporteur hopes that, once these procedural issues have been duly resolved, the trial will continue.

52. On 27 June 2008, the Court's Pre-Trial Chamber I opened the confirmation of charges hearing concerning Mr. Germain Katanga and Mr. Mathieu Ngudjolo Chui, both of whom are accused of war crimes and crimes against humanity. The victims' legal representatives participated in the hearing.

2. Central African Republic

53. On 3 July 2008, the Belgian authorities surrendered Mr. Jean-Pierre Bemba Gombo to the International Criminal Court. This and the fact that Mr. Bemba was arrested on 24 May 2008, just one day after the Court had issued a warrant for his arrest, is a testament to the spirit of cooperation shown by the Belgian Government in this case. Mr. Bemba, President and Commander-in-Chief of the Mouvement de libération du Congo (MLC), is accused of committing war crimes and crimes against humanity in the territory of the Central African Republic.

3. Darfur

54. On 5 December 2007, the Prosecutor of the International Criminal Court presented his sixth report to the Security Council. In his statement, he criticized the lack of cooperation by the Government of the Sudan and asked the Council to send a unanimous message to the State in question calling for compliance with Security Council resolution 1593 (2005) and the execution of the arrests requested by the Court. In April 2007, Pre-Trial Chamber I had issued arrest warrants for Ahmad Harun and Ali Kushayb on 51 counts of war crimes and crimes against humanity. On 4 June 2007, the Court had issued requests to the Government of the Sudan for the arrest and surrender of the two individuals. At the time of writing, neither of the two arrest warrants had been executed. The Special Rapporteur wishes to express his concern at the lack of cooperation by the Government of the Sudan with the Court and urges the Government of the Sudan and all other parties to the conflict to put an end to impunity for the crimes committed in Darfur, in accordance with resolution 1593 (2005) and the statement issued by the President of the Security Council on

16 June 2008.[41] On 14 July 2008, the Prosecutor of the Court applied for an arrest warrant for the Sudanese President, Omar Hassan Al-Bashir, who is accused of genocide, crimes against humanity and war crimes against the population of Darfur.

4. Uganda

55. On 8 July 2005 the International Criminal Court's Pre-Trial Chamber II issued five arrest warrants for five Lord's Resistance Army leaders on charges of crimes against humanity and war crimes. The Special Rapporteur is concerned to note that, more than three years after those warrants were issued, none of the five suspects has been detained.

C. Extraordinary Chambers in the Courts of Cambodia

56. The Special Rapporteur highlights the launching of the Extraordinary Chambers' activities. By the end of 2007 five suspects had been detained on orders from the Extraordinary Chambers, including former Head of State Khieu Samphan and Nuon Chea, known as "Brother Number Two". All five are accused of crimes against humanity, and three of them are also accused of war crimes. The Special Rapporteur also notes that the Pre-Trial Chamber held its first session in November 2007.

D. International Criminal Tribunal for Rwanda and International Tribunal for the Former Yugoslavia

57. The International Criminal Tribunal for Rwanda was established in 1994 to investigate and prosecute crimes of genocide, crimes against humanity and war crimes committed in Rwanda between 1 January and 31 December 1994. Since its establishment the Tribunal has brought proceedings against more than 50 individuals suspected of having perpetrated such crimes. For four years its President was Navanethem Pillay, currently the United Nations High Commissioner for Human Rights. On 5 August 2008 the Ministry of Justice of Rwanda published the report of the commission established by the Government in April 2006 to investigate France's alleged role in the genocide. The Ministry indicated that non-Rwandan nationals suspected of involvement in the genocide would be tried in a court of universal jurisdiction.

58. The International Tribunal for the Former Yugoslavia was established in 1993 to prosecute persons alleged to be responsible for serious crimes committed in the territory of the former Socialist Federal Republic of Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace. Since the Council, as of March 1999, had not yet decided when the Tribunal's jurisdiction would end, the crimes committed in the Kosovo crisis are within the Tribunal's jurisdiction.

59. As the two Tribunals were not established as permanent institutions, the Security Council, in its resolution 1503 (2003), set out a completion strategy under

[41] S/PRST/2008/21.

which the Tribunals would complete all trial activities at first instance by the end of 2008 and would complete all work in 2010.

60. On 4 June 2008 the Prosecutors of both Tribunals presented their reports on the status of implementation of the completion strategy to the Security Council. The reports indicate that despite the efforts made, a number of factors will delay the completion of activities beyond the established deadlines.

61. The Special Rapporteur is concerned that the departure of highly qualified judges and staff with experience in the Tribunals' work, referred to in both reports, may adversely affect the discharge of the Tribunals' mandates.

62. On 21 July 2008 Serbian authorities detained Radovan Karadzic, the former leader of the Bosnian Serbs in the Bosnia war (1992-1995), whom the Tribunal had accused of genocide. The Special Rapporteur welcomes this action and expresses satisfaction at the cooperation afforded by the Government of Serbia. In addition, he encourages the Serbian authorities to continue to cooperate with the Tribunal in order to find and detain Ratko Mladic.

63. With respect to the situation of the fugitives indicted by the International Criminal Tribunal for Rwanda, the information provided by the Prosecutor's Office, indicating a lack of cooperation by the Governments of Kenya and the Democratic Republic of the Congo, is troubling. The Special Rapporteur urges those Governments to meet their obligations in this regard.

64. Lastly, the Special Rapporteur trusts that the Security Council will extend the deadlines established in the completion strategy for the work of both Tribunals and will provide them with the resources they need in order to complete their important task.

E. Supreme Iraqi Criminal Tribunal

65. The Special Rapporteur notes with deep concern that persons sentenced to death in Iraq continue to be executed despite his repeated requests for suspension. The application of the death penalty in Iraq has constituted a serious violation of the right to the truth for the victims of crimes committed by the Saddam Hussein regime and, in the case of the execution of Awraz Abdel Aziz Mahmoud Sa'eed, victims of the attack on the United Nations that left Sergio Vieira de Mello and 21 others dead.

VIII. Conclusions and recommendations

66. **The role of the judiciary, together with that of international human rights protection bodies, is crucial for guaranteeing that states of emergency are declared and implemented in accordance with the principles governing them and that the measures taken in emergency situations do not interfere with the exercise of human rights and in no case interfere with rights considered non-derogable under international law. The Special Rapporteur accordingly urges States not to limit the operation of the justice system in such circumstances. In addition, he invites the General Assembly to pay special attention to the issue of human rights in states of emergency and recommends that a permanent list of countries that are in such circumstances be maintained**

and continuously updated, with information on the reasons given, a list of the rights suspended and the starting and ending dates of the measure, and that an international instrument be drafted on principles for the protection of human rights during states of emergency.

67. It is not only during states of emergency that States suspend or limit rights; there is a worrisome trend towards the restriction of rights in the name of defending national security, combating terrorism and controlling immigration. The rights most severely affected by these practices are the ones set out in articles 9 and 14 of the International Covenant on Civil and Political Rights. In such cases, the judiciary should play a key role in clarifying the limits of executive power where human rights are concerned. Although articles 9 and 14 of the Covenant are not included in the list of non-derogable rights contained in article 4, paragraph 2, they do comprise elements that may not be suspended under any circumstances.

68. Underpayment of judges or the practice of making their pay levels contingent on the decisions they take are serious impediments to the operation of the justice system and may compromise its independence and impartiality. The Special Rapporteur undertakes to explore this issue in more depth in his forthcoming reports and recalls that it is a universal principle that judges are entitled to adequate remuneration, commensurate with the responsibilities of their function, that shields them from political or financial pressures that may affect their independence and impartiality. It is on this principle that the idea of giving the judicial branch full budgetary autonomy is based.

69. The Special Rapporteur urges States to strengthen their political, diplomatic, judicial and financial support for the International Criminal Court. Such support should be reflected in, among other measures, close cooperation in the detection, capture and handover of persons indicted by the Court and the fulfilment, at the national level, of the legal requirements of the Rome Statute.

70. The Special Rapporteur has stressed the need to make every effort to investigate the criminal attack on the United Nations in Baghdad five years ago. In view of the lack of concrete results, he has proposed, and here reiterates, that a panel of high-level experts should be established for that purpose.